



# Litigation Update

Litigation Section News

December 2007

## Attorney client privilege may apply to documents created by others. *Evid. Code*

§952 extends the attorney client privilege to communications “to whom disclosure is reasonably necessary for the transmission of information or the accomplishment of the purpose for which the lawyer is consulted.” *Zurich American Insurance Co. v. Sup.Ct. (Watts Industries, Inc.)* (Cal. App. Second Dist., Div. 4; October 11, 2007) 155 Cal.App.4th 1485, [66 Cal.Rptr.3d 833, 2007 DJDAR 15619], held that this includes inter-company communications, even if not originated by the lawyer, transmitting legal advice received from the lawyer.

## Statutory notice and tolling agreement between homeowners’ association and builder tolls statute as to subcontractors as well. *Civ. Code*

§1375(b) provides that when a homeowners’ association serves a required “notice of commencement of legal proceedings” on a builder, develop-

er or general contractor, the “notice shall toll all applicable statutes of limitation and repose, whether contractual or statutory, by and against all potentially responsible parties.” Thus, even though the notice only names the builder, developer, or contractor, *Landale-Cameron Court, Inc. v. Ahonen* (Cal. App. Second Dist., Div. 2; September 10, 2007) (ord. pub. October 10, 2007) 155 Cal.App.4th 1401, [66 Cal.Rptr.3d 776, 2007 DJDAR 15613], held that the statute is tolled as to any action against subcontractors as well.

## Federal court must follow decisions of state intermediate appellate court.

Where a cause of action asserted in federal court is based on state law, the federal court must follow precedent set by the state’s intermediate appellate court, unless the court finds convincing evidence that it is unlikely the state’s Supreme Court would follow the precedent. *Ryman v. Sears, Roebuck and Co.* (9th Cir.; October 12, 2007) [12 Wage & Hour Cas. 2d (BNA) 1682, 2007 DJDAR 15667].

**Note:** The converse is not true. Our state courts are not required to follow federal precedent, even if the matter involves a federal statute, except for decisions of the U.S. Supreme Court. Decisions of the federal appellate courts are merely persuasive. *People v. Bradford* (1997) 15 Cal.4th 1229, 1292, [65 Cal.Rptr. 145, 177].

## California’s endangered kangaroos face further peril.

We previously reported a series of cases dealing with the legality of the sale of kangaroo products. Our Supreme Court finally held that a California statute banning the sale of such products did not violate a federal treaty with Australia and therefore was legal and enforceable. *Viva Intern. Voice for Animals v. Adidas*

*Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, [63 Cal.Rptr.3d 50].

The legislature finally stepped into the breach and legalized the trade in such products by repealing that portion of *Pen. Code* §653o prohibiting the importation of kangaroo products until January 1, 2011. Thus, for now, you can put kangaroo stew back on your menu. By 2011 there probably won’t be any kangaroos left living in the wild in California.

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

Your participation is important and greatly appreciated.

## Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

**Motion to compel production must be made within 60 days of objections.** *Code Civ.Proc.* §2025.480 provides that if a deponent fails to answer a question, a motion to compel must be made within 60 days after the completion of the record. The same 60 day limitation applies to a motion to compel production of documents. Where third parties file objections to subpoenaed documents, the motion to compel must be made within 60 days of the receipt of these objections by the subpoenaing party.

**Tortfeasor who settles wrongful death suit with one heir may still be liable to another heir.** In *Romero v. Pacific Gas & Electric Co.* (Cal. App. Third Dist.; October 18, 2007) 156 Cal.App.4th 211, [2007 DJDAR 15957], defendant settled mother's wrongful death suit. Although father was named in the complaint as a

nominal defendant, he was never served. He then sued. In spite of the one action rule, the Court of Appeal overruled the trial court's sustaining of defendant's demurrer. Where tortfeasors settle a wrongful death claim with one survivor, knowing there are other heirs, they remain potentially liable to the remaining heirs.

**Statute of frauds barred sale of real property where only one partner signed the listing agreement.** *Corp. Code* §16301 permits a partner to bind the partnership to a contract without the written authorization of the other partners. But where the partnership was not in the business of selling real property, the written authorizations of all partners were required to sell such property under the statute of frauds. *Elias Real Estate LLC v. Tseng* (Cal. App. Second Dist., Div. 5; October 25, 2007) 156 Cal.App.4th 425, [2007 DJDAR 16148].

**Are lawyers going the way of the dinosaurs?** The ABA Journal Weekly Newsletter reports that "a well-known lawyer and information technology expert is publishing a sequel to his decade-old book, *The Future of Law*, and the future he now foresees for many traditional attorneys isn't a bright one." The report quotes a statement from the *London Times* that "Richard Susskind argues that that lawyers and the

legal profession in their present shape face extinction—or at least are on the brink of fundamental transformation."

"Information technology and outsourcing of specific portions of what used to be a lawyer's job are eroding and will eventually eliminate the practice of law as we now know it, Susskind predicts. Thus clients, he contends, are increasingly unwilling to pay expensive lawyers for advice, research and drafting that 'smart systems and processes' can do better."

## Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at <http://members.calbar.ca.gov/discuss>

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